IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-697

DR. HERBERT R. NORTHRUP,
Petitioner,
v.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND,
And
UNITED STEELWORKERS OF AMERICA,
AFL-CIO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO

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Respondent United Steelworkers of America, AFL-CIO (hereinafter "Steelworkers") submits this brief in opposition to the petition for certiorari which seeks review of the First Circuit's unreported decision denying mandamus in the case of *In Re Dr. Herbert R. Northrup,* No. 76-1346 (filed August 17, 1976) (Pet. App. 88a).

JURISDICTION

The petition is jurisdictionally defective because it was filed out of time. The First Circuit's Memorandum and Order was entered on August 17, 1976 (Pet. App. 88a). It was not until 92 days later on November 17, 1976, that the certiorari petition was filed. No Justice of this Court has extended the time for filing the petition. Therefore the petition was not filed within the statutorily specified time for filing a certiorari petition of 90 days and should be denied. 28 U.S.C. § 2101(c).

ADDITIONAL STATUTES AND RULES INVOLVED

Rule 26(c) of the Federal Rules of Civil Procedure reads in relevant part as follows:

> "**Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; . . . ." (Fed.R.Civ.P. 26(c).

ARGUMENT

Even if the petition were not untimely, it should still be denied. The petition presents no important federal issue. The propriety of the ruling by the courts below permitting petitioner to be deposed and vacating the magistrate's sweeping protective order turns upon the factual determination, adverse to petitioner, that petitioner had substantial prior involvement in this litigation. Moreover, the principles of liberal pre-trial discovery applied by the courts below are consistent with the law applied in other circuits. Thus, this petition is totally undeserving of review by this Court and should be denied.

The underlying litigation is a Supremacy Clause challenge to the Rhode Island statute which requires that the payment of unemployment compensation to persons who are unemployed because of a strike be withheld until after the seventh week of such unemployment.[1] Petitioner has been involved directly in this litigation since its inception almost five years ago. The matter first came on for a hearing in the district court in May of 1972 upon motions for a preliminary injunction and for dismissal. The district court has set forth the details of that Hearing and Dr. Northrup's direct involvement therein as follows:

> "Shortly after this case was commenced in 1972, this court heard the plaintiff's motion for a

1. There is a general statutory requirement in Rhode Island of one week of unemployment before benefits may be paid to any unemployed person, R.I.G.L. § 28-44-14, and an additional six weeks of unemployment is required of persons who are "unemployed because of a strike. . . ." R.I.G.L. § 28-44-16.

> preliminary injunction. At that hearing Armand J. [Thieblot], Jr. and Ronald M. Cowin testified as expert witnesses for Grinnell on the impact of the payment of unemployment compensation benefits to strikers. Both men had been associated with the Industrial Research Unit of the Wharton School of Finance and Commerce of the University of Pennsylvania and were experts by virtue of a study conducted by them beginning in 1970 and published in April, 1972 by the Industrial Research Unit as Report No. 6, entitled *Welfare and Strikers* [sic]: *The Use of Public Funds to Support Strikers*. This study was introduced as an exhibit by Grinnell. Also introduced by Grinnell was an affidavit of Dr. Herbert R. Northrup, Director of the Industrial Research Unit, expressing his expert opinion on the same topic." (Pet. App. 63a).

Thus petitioner gave affidavit testimony supporting Report No. 6 and plaintiffs' case. Admittedly petitioner disputes the district court's finding of fact (Pet. 11, 6), but on appeal from the district court's initial dismissal of this case, the First Circuit specifically noted that petitioner's affidavit was part of the evidentiary record:

> "An affidavit by Herbert Northrup, the supervisor of the project at the University of Pennsylvania School of Finance which led to the book, was also introduced as an exhibit." *Grinnell Corporation v. Hackett*, 475 F.2d 449, 452 (1973), *cert. denied*, 414 U. S. 858, 879 (1973).

In 1973, the First Circuit reversed the district court's order of dismissal and remanded with instructions that the case be tried under an extremely broad

evidentiary standard called the "macrocosmic test."[2] In July of 1974, the Steelworkers served a set of extensive interrogatories upon both plaintiff Grinnell Corporation (hereinafter "Grinnell") and the plaintiff-intervenor Chamber of Commerce (hereinafter "Chamber") seeking identification of each "survey, statistical study, or other document" which supported their position with respect to the elements of the First Circuit's "macrocosmic test." Both the Chamber and Grinnell objected to answering these interrogatories, but in late 1974, the district court directed that these interrogatories be answered. *Grinnell Corporation v. Hackett,* 20 Fed. Rules Serv. 2d 668, 671-673 (D.R.I., filed Dec. 30, 1974), *appeal dismissed, mandamus denied,* 519 F.2d 595 (1st Cir. 1975), *cert. denied sub nom., Chamber of Commerce of U.S. v. Steelworkers,* 423 U. S. 1033 (1975). Thereafter in early 1975, both Grinnell and the Chamber filed responses identifying Report No. 6 and petitioner's affidavit as major pieces of their documentary evidence (Pet. App. 73a).

2. The elements of the "macrocosmic test" were summarized by the First Circuit as follows:

> "The relevant question then in determining this statute's impact upon the federal collective bargaining policy is whether the receipt or expectation of receipt of unemployment compensation benefits after seven weeks of a strike causes workers to stiffen bargaining demands beyond those they would have made without such benefits, to strike in the first instance when they would otherwise have settled, or to continue a strike for a longer period than they otherwise would." *Grinnell Corporation v. Hackett,* 475 F.2d 449, 457-458 (1973), *cert. denied,* 414 U. S. 858, 879 (1973).

The continuing vitality of the "macrocosmic test" as the standard governing Supremacy Clause challenges to state payment of unemployment compensation to strikers is open to question, to say the least, now that this Court has dismissed for want of a substantial federal question an appeal raising a similar preemption issue. *Kimbell v. Employment Security Comm. of New Mexico,* ..... U. S. ....., 97 S. Ct. 36 (1976).

It was in this context of strong reliance being placed upon Report No. 6 that counsel for the Steelworkers decided as a matter of necessary trial preparation that depositions would have to be taken of petitioner, Thieblot and Cowin (Resp. App. 1-2a).[3] All counsel were informed that such depositions "would be strictly limited to discovering the background and details concerning Report No. 6, and . . . the depositions would not be used to attempt to discover any present expert opinion those individuals may now possess which has been developed in anticipation of litigation." (Pet. App. 9-10a). The Steelworkers noticed the depositions of Thieblot, Cowin and petitioner in both *Grinnell* and in *Dow v. Taylor,* C. A. No. 38644 (E.D. Mich.)[4]

3. The Appendix to this Brief contains a reproduction of the affidavit of the Steelworkers' trial counsel, which affidavit was filed in the district court in support of the Steelworkers' appeal from the magistrate's entry of the protective order.

4. The *Dow* case involves a similar Supremacy Clause challenge to Michigan's policy of paying unemployment compensation to strikers. In *Dow,* as here, Report No. 6 and petitioner's almost identical affidavit are part of the evidentiary record, and there, as here, the plaintiffs placed primary reliance upon those documents in responding to an identical set of Steelworkers' interrogatories. When the district court in *Dow* granted the Steelworkers leave to despose petitioner and Thieblot and Cowin, they took the extraordinary step of withdrawing as witnesses in *Dow* rather than be deposed. The withdrawal letter is reproduced in the Appendix to this Brief (Resp. App. 3-4a).

The Discovery Rules provide that, unless limited by a court order, the Steelworkers are entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .". Fed.R.Civ.P. 26(b) (1). The relevancy of the information about which the Steelworkers sought to depose petitioner was not disputed, and both the district court and the magistrate found the information sought to be relevant (Pet. App. 73a).[5] Notwithstanding the clear relevance of the information sought, the magistrate entered a protective order absolutely prohibiting the Steelworkers from deposing petitioner or Thieblot and Cowin. The magistrate also denied the Steelworkers' motion in the alternative for reconsideration of the protective order and for judicial leave to depose the experts pursuant to Fed. R. Civ. P. 26(b)(4) (A) & (B). It was the entry of the protective order which the district court reversed upon the Steelworkers' timely appeal.

The reversal of the protective order does not implicate any important issues regarding the role of magistrates *vis-a-vis* district courts. The district court did no more than hold that the magistrate's finding that petitioner had met the "good cause" requirement of Fed.R. Civ.P. 26(c) was a clear error of law. The magistrate's finding that the likelihood of harrassment was "more probable then not" was held to be legally insufficient to satisfy the "good cause" requirement for a protective order because the information sought was also admittedly relevant (Pet. App. 74a). The standard of review applied by the district court is consonant with the statutorily specified standard of "contrary to law." 28 U.S.C. § 636(b)(1)(A). Contrary to petitioner's assertion (Pet. 17), the district court did not usurp the magistrate's function in noting that it is "undisputed that Report No. 6 was not prepared in anticipation of litigation or for trial. . . ." (Pet. App. 68a). The magistrate made no explicit finding on this point. Indeed, Grinnell never raised this issue in any of the courts below.

Nor does the interpretation which the district court gave to Fed.R.Civ.P. 26(b)(4) conflict with interpretations applied in other circuits. Reading the words of the rule literally, the district court held that the exception to liberal discovery, which Fed.R.Civ.P. 26(b)(4) creates for experts, extends no further than the experts' trial preparation— "facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial . . . ." Fed.R.Civ.P. 26(b)(4). This narrow construction of the expert's discovery exemption comports well with the Second Circuit's holding that the policy which underlies Fed.R.Civ.P. 26(b)(4) is to allow "more liberal discovery of potential expert testimony . . . ." *Weiss v. Chrysler Motors Corporation*, 515 F.2d 449, 457 (1975). Indeed, the district court's ruling that an expert is treated just like any other person under the Discovery Rules as to facts

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5. The magistrate's relevancy finding is contained at page 41 of the Transcript of the June 17, 1975 Hearing. In pertinent part, it reads:

> "THE COURT: Well, relevance, given the posture of that in the alternate, either that they are actors, which I have held they are not, or that they are experts, either of them. I think it has little to do with relevancy. *I think what you seek is relevant, that is relevant to the subject matter of the litigation. . . .*" (Emphasis added).

known or opinions held, except as to material acquired or developed in anticipation of litigation or for use at trial, is identical to the interpretation suggested by the commentators and the Advisory Committee. 8 Wright & Miller, *Federal Practice and Procedure,* Civil § 2033 at 257-258 (1970); Proposed Amendments to the Federal Rules of Civil Procedure with Advisory Committee's Notes, 48 F.R.D. 487, 503-505 (1970).

The cases which petitioner has cited are inapposite to the situation here where petitioner will be deposed solely as to the factual background of Report No. 6, which is not part of any expert's trial preparation materials. In each case petitioner has cited, the expert was to be deposed concerning matters which that expert had been specially retained or specially employed to review by the other party for use at trial or "in anticipation of litigation." *See, e.g., Crockett v. Virginia Folding Box Co.,* 61 F.R.D. 312, 320 (E.D. Va. 1974).

Finally, denial of mandamus is especially appropriate in cases, such as this one, where absolute protective orders are denied in the face of broad claims of privilege[6] but where the question of more limited pro-

6. Petitioner asserts an absolute privilege to being deposed based upon an alleged invasion of "academic freedom." The magistrate placed no reliance on petitioner's claim of "academic freedom," and the district court rejected it outright (Pet. App. 77a). Moreover, even if petitioner did have a privilege, which he did not because the deposition will not implicate or interfere with any relationship of petitioner to his pupils, petitioner's affidavit testimony given in the court below would constitute a waiver of any such privilege. *See, United States v. Nobles,* 422 U. S. 225, 239-240 (1975).

tection is left undecided. *Kerr v. U. S. District Ct. for N. D. of Cal.,* ..... U. S. ....., 96 S. Ct. 2119 (1976). In reversing the broad protective order, the district court placed reliance on the fact that "the depositions were to be strictly limited to the involvement of these three persons in the creation and publication of Report No. 6 . . . ." (Pet. App. 76-77a). Likewise, the First Circuit placed reliance upon the narrow scope in denying mandamus (Pet. App. 88a). That the district court has left the door open for more limited protection is obvious from its criticism of the magistrate for banning all discovery instead of "qualify[ing] the Steelworkers' right to discovery in one of the less restrictive ways described in Rule 26(c) . . . ." (Pet. App. 73a). In point of fact, the Steelworkers offered before the magistrate to enter into a broad protective order controlling the manner in which the deposition is taken or the results disclosed.[7]

7. The Transcript of the June 17, 1975, Hearing contains at pages 47 and 48 the following colloquy between the Steelworkers' counsel and the magistrate with regard to protective orders:

> "MR. MILASI: . . . . And I know that the Court has information in which it indicates that unions have pursued Dr. Northrup, but the only thing I can ask the Court to do is to take into account that the Court can control any such problem by a protective order. In other words, if the Court is worried about the results of the deposition and they can be taken and filed or controlled in any way which this court wants to, so they are not disclosed or they are purely part of this public record. If the Court looks at the transcript and says that this is harrassment, that part can be controlled later on. If that is what the court's consideration is.
>
> THE COURT: In other words, the taking of the deposition?

Indeed, this entire proceeding is premature because petitioner has an adequate remedy under Fed.R.Civ.P. 30(d). Once the deposition has begun, petitioner has the right to ask the district court to terminate the deposition or further limit its scope if the particular questions asked at the deposition reveal that the examination is being conducted in bad faith or to annoy or embarrass the petitioner. Petitioner would then have a concrete factual background against which the district court can gauge petitioner's presently abstract contentions of harrassment and invasion of academic freedom. *See, Kerr v. U. S. District Ct. for N. D. of Cal., supra.*

MR. MILASICH: Yes, Your Honor. I mean if that is what this Court is afraid of. Your Honor, we'll take whatever steps as we did in the discovery Friday at the Chamber of Commerce. We agreed to the entry of protective order. We offered to enter into any kind to protect them the way they want. We want the information so that this case can be litigated on its factual merits...."

CONCLUSION

No issue in this case warrants this Court's attention, and none are ripe for review. This untimely petition for certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

Affidavit of Carl B. Frankel

Commonwealth of Pennsylvania
County of Allegheny } ss.:

I, Carl B. Frankel, Esquire, one of the attorneys for the defendant-intervenor United Steelworkers of America, AFL-CIO in *Grinnell v. Hackett,* Civil No. 4926 (D.R.I.) and in *Dow v. Taylor,* Civil No. 38644 (E.D. Mich.), being duly sworn, deposes and says:

1. This Affidavit is given in support of the defendant-intervenor's motion for an order reconsidering and vacating or amending Magistrate Hagopian's ruling made orally on June 17, 1975, denying leave to the defendant-intervenor to conduct depositions of Messrs. Northrup, Thieblot and Cowin limited to discovering the factual background of their study, Report No. 6, "Welfare and Strikes: The Use of Public Funds to Support Strikers" (hereafter "Report No. 6.").

2. The decision to conduct these depositions was mine alone, and it was arrived at without consultation with I. W. Abel, Leo Perlis, Emil Mazey, or with any labor union leader or official.

3. I concluded that the depositions were necessary because Report No. 6 had been submitted in both *Dow* and *Grinnell;* because I felt that Report No. 6 was biased and unsound both as to its conclusions and methodology; and, because I felt that deposing these three individuals would be the only way to bring to light the facts showing that Report No. 6 was so biased and unsound.

4. During the course of scheduling these depositions, I made it clear to attorneys for Dow and the Chamber that the Steelworkers would not proceed with

the depositions if Report No. 6 were to be stricken from the Record and if they were to agree not to cite Report No. 6 in any manner in either *Dow* or *Grinnell*. Our offer was refused.

5. I do not know of any continuing effort by the AFL-CIO or other unions to intimidate or coerce Dr. Northrup, the Wharton School of Business or the University of Pennsylvania, and the Steelworkers' scheduling of the depositions of Messrs. Northrup, Thieblot and Cowin is neither a part of such a union effort, nor is it an attempt by the Steelworkers to coerce or intimidate these individuals or the academic institutions with which they are connected.

6. The Steelworkers were forced to intervene in *Dow* and *Grinnell* in order to protect the legitimate interests of its members against the legal attack mounted by the respective employers, and the purpose of taking these depositions is to garner all the facts surrounding Report No. 6 in order that the evidentiary weight to be accorded that report in these lawsuits may be properly determined.

CARL B. FRANKEL

(SUBSCRIPTION OMITTED IN PRINTING)

(HEADING OMITTED IN PRINTING)

October 9, 1975

The Honorable John Feikens
United States District Court
Eastern District of Michigan
851 Federal Building
Detroit, Michigan 48226

Dear Judge Feikens:

Re: Dow Chemical Company, et al v. S. Martin Taylor, Director, et al CA 38644

We represent the three expert witnesses, Dr. Herbert R. Northrup, Professor Armand J. Theiblot, Jr., and Mr. Ronald M. Cowin.

On September 19, 1975, you heard three motions with respect to the attempt by the defendant-intervenor, United Steelworkers, to depose these experts.

You denied the motion of plaintiff, Dow Chemical Company, for a protective order against taking the depositions.

You denied the motion of our clients, the three experts, for a stay of the depositions.

You expressed your opinion that the United Steelworkers should be permitted to depose the three experts unless either

(a) plaintiffs represented to you that neither would adduce testimony at trial from the defendants, or

(b) the experts themselves represented to you that they did not wish to testify at the trial in behalf of plaintiffs, or either of them.

No such representation having been made at such hearing, you stated you would permit the taking of the depositions with certain precautionary measures but would reconsider granting such permission to depose such experts in the event of receipt from them of their representations that they declined to testify at the trial.

We have just been advised by Mr. George M. Vetter, Jr., attorney for the expert witnesses, that each expert declines to testify at the trial on behalf of any of the plaintiffs and each further declines to be retained or especially employed by plaintiffs in preparation for the trial.

In light of these expressions by the experts, we will immediately prepare and submit to you a proposed Order.

Respectfully,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

NATHAN B. GOODNOW

NBG:mw

P.S. We have unsuccessfully extended our best efforts to communicate with Ross Palmer in order to quote the relevant parts of the transcript covering the September 19 hearing. The statements made in this letter are based upon my notes and recollection.